Kerajaan Malaysia v Yong Siew Choon

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-21-34 OF 1991
KAMALANATHAN RATNAM J
30 SEPTEMBER 1998

Succession — *Letters of administration — No application taken out — Deceased's wife did not petition for grant of probate and letter of administration — Deceased did not leave assets — Whether wife is legal representative of deceased husband's estate — Whether 'wakil sah' referred to in Income Tax Act 1967*

Revenue Law — *Income tax — Payment of tax outstanding — Ex gratia payment by deceased's firm to defendant — Whether defendant successfully proved ex gratia payment — Whether payment exempted from tax*

The plaintiff sued the defendant as 'wakil sah' of the estate of her late husband Abdul Hamid bin Tun Azmi ('the deceased') for the unpaid income tax of the deceased for two years and the penalty for non-payment together with interest. Prior to his death, the deceased was a partner in the legal firm of Shook Lin & Bok. The defendant denied the allegation that she was the 'wakil sah' of the deceased and contended that: (i) the sum of RM280,000 which she received from Shook Lin & Bok was in fact an ex gratia payment to her as the widow of the deceased and was exempted from taxation; (ii) after the demise of her husband, she did not petition for any grant of probate or letters of administration as the deceased did not leave any assets at all; and (iii) the plaintiff had no legal right to sue the defendant as the words 'wakil sah' did not exist either in the Income Tax Act 1967 ('the Act') nor in the Probate and Administration Act 1959.

Held, allowing the plaintiff's claim:

(1) No one from the firm of Shook Lin & Bok was called to confirm that the said payment was indeed an ex gratia payment and exempted under the Act. The court ought to draw an adverse inference against this omission (see p 33E–F).

(2) In the dictionary, the word 'sah' is defined as legal, justified, authoritative and the word 'wakil' is defined as representative. As such, until probate or grant of legal administration is obtained, the person most acceptable to manage the estate of the deceased is the legal representative which on the facts was the defendant. The position of a legal representative does not impose itself only when there are assets to administer. That position unfolds itself immediately upon the death of the person concerned, until such time as probate or legal administration is obtained (see p 33A–C).

(3) Section 2 of the Act clearly encompasses persons under the category of the defendant. Although the defendant had neither taken probate nor letters of administration, she was clearly administrating the estate of her deceased husband when she

signed the Form B, the 'return of income by an individual', for the years 1984 and 1985 (see p 32H).

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan sebagai wakil sah harta pusaka mendiang suaminya Abdul Hamid bin Tun Azmi ('si mati') untuk cukai pendapatan si mati yang tidak dibayar selama dua tahun dan penalti kerana tidak membayar bersama dengan faedah. Sebelum kematiannya, si mati merupakan seorang rakan kongsi dalam firma guaman Shook Lin & Bok. Defendan menafikan pengataan bahawa ia merupakan wakil sah si mati dan menghujahkan bahawa: (i) jumlah sebanyak RM280,000 yang diterima daripada Shook Lin & Bok sebenarnya adalah bayaran ex gratia kepadanya sebagai balu si mati dan dikecualikan daripada pencukaian; (ii) selepas peninggalan suaminya, ia tidak mengemukakan petisyen untuk sebarang perintah probet atau surat pentadbiran kerana si mati tidak meninggalkan apa-apa aset sama sekali; dan (iii) plaintif tidak mempunyai hak yang sah di sisi undang-undang untuk mendakwa defendan kerana perkataan-perkataan 'wakil sah' tidak wujud sama ada dalam Akta Cukai Pendapatan 1967 ('Akta tersebut') atau pun dalam Akta Probet dan Pentadbiran 1959.

Diputuskan, membenarkan tuntutan plaintif:

(1) Tiada siapa dari firma Shook Lin & Bok telah dipanggil untuk mengesahkan bahawa bayaran tersebut memanglah suatu bayaran ex gratia dan dikecualikan di bawah Akta tersebut. Mahkamah seharusnya membuat inferens bertentangan terhadap peninggalan ini (lihat ms 33E–F).

(2) Dalam kamus, perkataan 'sah' ditakrifkan sebagai 'legal', 'justified', 'authoritative' dan perkataan 'wakil' ditakrifkan sebagai 'representative'. Oleh yang demikian, sehingga probet atau perintah pentadbiran undang-undang diperolehi, orang yang paling boleh diterima untuk menguruskan harta pusaka si mati adalah wakil sah yang mana atas faktanya adalah defendan. Kedudukan seorang wakil sah tidak berbangkit hanya apabila terdapat aset untuk ditadbir. Kedudukan itu timbul dengan segera apabila berlakunya kematian orang yang berkenaan, sehingga probet atau pentadbiran sah diperolehi (lihat ms 33A–C).

(3) Seksyen 2 Akta tersebut dengan jelas meliputi orang di bawah kategori defendan. Walaupun defendan tidak mengambil probet atau pun surat pentadbiran, ia dengan jelasnya mentadbir harta pusaka mendiang suaminya apabila ia menandatangani Borang B, 'return of income by an individual', untuk tahun-tahun 1984 dan 1985 (lihat ms 32H).]

Notes

For a case on no application taken out for letters of administration, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1930.

For a case on payment of tax outstanding, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1867.

Cases referred to

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473 (refd)

Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119 (refd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163 (refd)

Legislation referred to

Income Tax Act 1976 ss 2, 74(1), 103(1), (4), (5), 106(1), (3), 142(1)

Probate and Administration Act 1959 s 39

Abu Tariq bin Jamaluddin (Jabatan Hasil Dalam Negeri) for the plaintiff.

Jagjit Singh (*Jagjit Singh & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff is suing the defendant as 'wakil sah' of the estate of the deceased, Abdul Hamid bin Tun Azmi, her late husband. The deceased was, prior to his death, a partner in the legal firm of Shook Lin & Bok. He died on 12 January 1984.

Case for the plaintiff

The plaintiff's case was that notices of assessment dated 25 August 1984 and 11 June 1986 were posted to the last known address of the defendant and that the defendant had made payment of a sum of RM5,887.52 in respect of the year 1984 within the stipulated 30 days from the date of notice of taxation. Because the defendant had failed to settle the balance, a penalty was added. The plaintiff therefore prayed for the unpaid income tax of the deceased for the years of assessment 1984 and 1985 amounting to RM290,918.87 which included the penalty for non-payment together with interest at 8% on the said sum from the date of judgment to realization and costs.

Case for the defence

The defendant specifically denied the allegation that she was the 'wakil sah' of the deceased. The defendant contended that the sum of RM280,000 which she received from the firm of Shook Lin & Bok upon the demise of her husband was in fact an ex gratia payment by the said firm to the defendant as the widow of the deceased and was exempted from taxation.

Findings of the court

The plaintiff relied on s 103(1) of the Income Tax Act 1967 ('the Act') which reads as follows:

> Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment.

Encik Abu Tariq for the plaintiff argued that pursuant to s 103(1) of the Act, it becomes the liability of the defendant to pay the tax upon receipt of the notice of assessment. He also referred me to s 106(1) and (3) of the Act. The same are reproduced:

> (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
>
> ...
>
> (3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), (5) or (5A).

Linking s 106 to s 142(1) of the Act, he argued that the defendant who was named in the certificate as shown in the common agreed bundle of documents ('CABD') at p 24, ought to be held liable to settle the judgment sum. It is therefore necessary to reproduce s 142(1). It reads as follows:

> In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

Learned counsel for the plaintiff referred me to the Federal Court decision in *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163, where the court held that if the tax payer wished to contend that the amount of tax sought to be recovered was excessive, incorrectly assessed or incorrectly increased, he has to do so by way of appeal to the special commissioners. The Federal Court held at p 164:

> ... It is only in relation to any disputes on questions of law at the hearing before the special commissioners that the matter can be brought to the High Court by way of a case stated.

The plaintiff argued that since the special commissioners are the proper persons to hear any question in relation to this matter, the defendant ought to have appealed to the special commissioners. The plaintiff submitted that whether the defendant is the 'wakil sah' or not, is a fact that ought to be decided by the special commissioners.

The defendant testified that she was a house wife with no income whatsoever. After the demise of her husband, she did not petition for any grant of probate or for letters of administration as the deceased did not leave any assets at all. The defendant was firm on the issue that she did not in any

way administer or manage the estate of the deceased because there was nothing for the defendant to administer. She maintained that she did not pay the sum of RM290,918.87 to the plaintiff because she was not indebted to the plaintiff. A

Mr Jagjit Singh for the defendant, with his customary persuasiveness, argued that the plaintiff had no legal right to sue the defendant after fixing a label to the defendant as 'wakil sah kepada harta pesaka Abdul Hamid bin Tun Azmi'. It was his submission that the words 'wakil sah' did not exist either in the Income Tax Act 1967 nor in the Probate and Administration Act 1959. B

Since the plaintiff's claim is based on s 74(1) of the Act, it is necessary to reproduce the same. It reads: C

> Where an individual dies in the basis year for a year of assessment, his executors shall be assessable and chargeable to tax for that year of assessment, for the following year of assessment and, whenever necessary for any previous year of assessment in respect of the chargeable income of that individual for any such year of assessment; and, where they are so assessable and chargeable, they shall be assessable and chargeable to tax in like manner and to the like amount as the individual would be assessed and charged to tax if he had not died. D

Section 2 of the Act defined executor as 'the executor, administrator or *other person administering or managing the estate of a deceased person*'. (Emphasis added.) E

I reject Mr Jagjit's contention that the words 'wakil sah' have not been referred to in the Act. The agreed documents in the CABD show that it was the defendant who had completed and signed Form B, being the 'Return of income by an individual' for years of assessment 1984 and 1985. She had declared herself on signing the said forms as the wife of Abdul Hamid bin Tun Azmi (deceased). She explained in court that she signed the two forms because she was told by Ms Pang Siew Lan of Price Waterhouse, the firm of accountants that prepared the accounts of her husband's estate, that if she failed to sign the said forms she would be in trouble. However, this Ms Pang was never called to testify. In the absence of Ms Pang to explain to the contrary, I must therefore infer that obviously Ms Pang must have meant that she ought to sign as the legal representative or 'wakil sah' of her deceased husband. To my mind, the definition in s 2 clearly encompasses persons under the category of the defendant. Although she had neither taken probate nor letters of administration, she was clearly administrating the estate of her deceased husband when she signed the Form B for the years 1984 and 1985. F G H

In *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119, the Federal Court by way of obiter stated that the special commissioners are judges of fact and may consider issues which this court is prohibited by s 106(3) of the Act from entertaining. Although these words are obiter, I accept them as sound. In this case, the defendant is disputing the fact that I

she is the 'wakil sah'. The *Kamus Lengkap* (1990 Ed) defines 'sah' as legal, justified, authoritative and defines 'wakil' as representative. It is clear therefore that until probate or grant of legal administration is obtained, the person most acceptable to manage the estate of the deceased until such time as the grant is obtained is the legal representative. In this case, it is the wife. She contends that since there was nothing left in the estate, she had nothing to administer and therefore, she could not be the legal representative. The position of a legal representative does not impose itself only when there are assets to administer. That position unfolds itself immediately upon the death of the person concerned, until such time as probate or legal administration is obtained. Under s 39 of the Probate and Administration Act 1959, it shall be the Official Administrator Malaysia until administration is granted.

If, as contended by the defendant, the sum paid to her by the firm of Shook Lin & Bok was by way of ex gratia and paid to her personally and not as arising out of the estate of the deceased and thus exempted by para 14 of Sch 6 of the Act, it is unfortunate that she did not say so in either of the Forms B that she had filled up. On the contrary, under the paragraphs which required her to state the share of partnership income/loss, she had written as follows:

> Refer to firm's file
>
> Shook Lin & Bok 802814/01

Further, no one from the firm of Shook Lin & Bok was called to confirm that the said payment was indeed an ex gratia payment and exempted under the Act. Surely the defendant must accept that the court ought to draw an adverse inference against this omission. I have no hesitation in holding that the defendant clearly fell into the third category of a person defined as executor, namely as a person administering or managing the estate of the deceased person.

It is my judgment that once an assessment is made, the plaintiff can invoke ss 103 and 106 of the Act. The effect of these sections is that the tax payable under the said assessments shall upon the service of the notice of assessment on the person assessed, be due and payable at the place specified in the notice, whether or not that person appeals against the assessment. Such tax due and payable may be recovered by the government by civil proceedings as a debt due to the government. Under s 106(3), this court cannot entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased (see s 103(4) or (5) of the Act). By s 142(1) of the Act, the certificate of the Director General is sufficient evidence of the amount due and is sufficient authority for the court to give judgment for that amount.

Since the defendant had conceded in her submission that the amount is not in dispute, I hereby enter judgment for the plaintiff in the sum of RM290,918.87 with interest at 8% from date hereof to payment and costs.

I wish to add that had the defendant appealed to the special commissioners, and even if such an appeal had not been heard as yet, I could have, on the basis of the decision of the Supreme Court in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473, granted a stay of execution of the judgment until determination of the appeal by the special commissioners.

Plaintiff's claim allowed.

Reported by Mohd Rizal Abidin